Supreme Court, U.S.
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No. 92-1426

In The

Supreme Court of the United States

October Term, 1992

DONNIE RAYFORD TATE, Jr.,
CHEA TATE, BRANDI NICOLE TATE,
DONNIE RAYFORD TATE, Sr.,
and KATHY MAE TATE,

Petitioners,

-against-

HAROLD M. COLE,
FIRST STATE SERVICE CORP.,
an Arizona Corporation, and
SIERRA VISTA LAND AND DEVELOPMENT
COMPANY, a joint venture,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In a case of diversity jurisdiction, can there be a violation of the *Erie* doctrine and 28 USC § 1652 when the federal court applies the substantive law of the relevant state, simply because one party disagrees with the outcome?

2. Did petitioners fail to present specific facts from which a jury could reasonably conclude that the condition upon which the injury occurred was hidden and concealed, making summary judgment appropriate?

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Respondents respectfully pray that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit be denied.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Art. 18, Sec. 5 of the Constitution of the State of Arizona:

> Contributory negligence and assumption of risk.
>
> Section 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

Rule 10.1(a), Rules of Supreme Court: Considerations Governing Review On Writ of Certiorari.

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Rule 14.1(j), Rules of the Supreme Court

Content Of The Petition For A Writ Of Certiorari.

> .1. The petition for a writ of certiorari shall contain, in the order here indicated:

. . .

> (j) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 10.

Rule 14.3, Rules of the Supreme Court

> .3 All contentions in support of a petition for a writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph .1(j) of this Rule. No separate brief in support of a petition for a writ of certiorari will be received, and the Clerk will refuse to file any petition for a writ of certiorari to which is annexed or appended any supporting brief.

REASONS FOR DENYING THE WRIT

The petition should be denied for two reasons: First, petitioners present no issue of federal law, since the Ninth Circuit complied with *Erie* by applying the law of Arizona. Second, the Ninth Circuit correctly decided the case on its merits, affirming the District Court's grant of summary judgment in favor of respondents based on Arizona law which generally does not hold a landowner accountable for injury to a trespasser.

I. No Issue of Federal Law

Rule 10.1(a), Rules of the Supreme Court, indicates that reason to grant a petition for writ of certiorari exists when a United States court of appeals "has decided a *federal* question in a way in conflict with a state court of

last resort." (emphasis added) There is no federal question in this case. Federal jurisdiction exists because of the diversity of citizenship of the parties. This is a personal injury claim based on state tort law. Petitioners themselves argue that the Ninth Circuit misapplied *Arizona* case law.

While by its own terms Rule 10.1 does not restrict the Court's discretion, petitioners' attempt to create a phantom federal issue should not go unchallenged. Petitioners correctly point out that state law controls the resolution of this case. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). A federal issue might exist had the Ninth Circuit refused to apply Arizona law, but the majority's memorandum decision reflects that it relied exclusively on Arizona law to affirm the judgment. There is no federal issue simply because petitioners disagree with the majority's conclusions and hope that the case would have been decided differently by the Arizona Supreme Court. The Ninth Circuit complied with *Erie* by applying the rules established by Arizona's lawmakers.

Petitioners cite *Missouri v. Jenkins*, 495 U.S. 33 (1990), contending that it somehow sets a precedent for the Court to issue a writ under the present circumstances. In *Jenkins*, the District Court ruled on issues dealing with desegregation in a public school system. The Court found that the District Court went too far in its rulings and thus failed to follow a rule of federal law – that local authorities have the primary responsibility for resolving the problems of desegregation. *Id.* at 51-52. *Jenkins* is therefore inapposite, as no such rule of federal law is at issue in the present case.

Petitioners also cite *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956), where the Court issued its writ because of a "doubtful application" of *Erie*. *Id.* at 200. In *Bernhardt*, the issue was enforcement of an agreement to arbitrate. The Court of Appeals deemed the enforceability of the agreement a procedural issue not governed by *Erie*. This Court disagreed, finding the issue to be substantive, and held that under the *Erie* doctrine state law should control whether the agreement was enforceable. In the present matter, petitioners attempt to create a federal issue by arguing that *Erie* was doubtfully applied, not because the Ninth Circuit failed to apply the law of Arizona, but because petitioners believe that the Ninth Circuit incorrectly applied the law of Arizona. This makes no sense. There is no doubt that the Ninth Circuit complied with *Erie* by applying Arizona law.

II. On the Merits

Petitioners argued to the Ninth Circuit that Donnie Tate was a trespasser at the time of his injury. As such, he was "lowest in the legal scale" and had no right to demand that respondents, the landowners, "provide [him] with a safe place to trespass;" Tate assumed the risk of what he might encounter and was "expected to look out for [him]self." Prosser and Keeton, *The Law of Torts*, § 58 at 393 (5th Ed. 1984).

"Ordinarily the duty of a landowner to a trespasser is not to willfully or wantonly injure him." *Moore v. Tucson Elec. Power Co.*, 761 P.2d 1091, 1092 (1988). Arizona, like the majority of states, is committed to the common law distinction among trespassers, licensees and invitees,

because the rules accompanying these entrant classifications give certainty and predictability to commercial and private legal relations. *Id.* at 1093. Inevitably, there are some exceptions to the general rules, but the further one strays from the general rules the weaker and less valuable the common law distinctions become.

Potentially applicable exceptions to the general rules controlling liability of a landowner to a trespasser or licensee are stated in *Restatement (2d) Torts* §§ 335, 337, 341. The Court of Appeals correctly stated that landowner liability under these exceptions requires a finding that the fifteen-foot cliff upon which Tate was injured was a hidden or concealed condition which Tate could not be expected to discover. Petitioners presented no evidence in the District Court from which one could reasonably make such a finding.

No such evidence is discussed in the petition; instead, petitioners concentrate on their argument that respondents had reason to know of the danger, a point not conceded by respondents which is irrelevant unless petitioners can establish that the cliff was hidden or concealed.

In support of their position that the cliff was hidden or concealed, petitioners do present, in lieu of evidence, a reference to briefs and petitions filed in the Court of Appeals. (see pp. 17-18 of Petition) This is a violation of Rules 14.1(j), 14.3, Rules of the Supreme Court, which require that all arguments in support of the petition be set forth in the body of the petition. Petitioners consider the arguments set forth in the Court of Appeals filings to

be specious. For that reason, and because those arguments referred to are not presented in the body of the Petition for Writ of Certiorari, in violation of the Court's rules, respondents will not address those arguments here.

Petitioners rely primarily on *Webster v. Culbertson*, 761 P.2d 1063 (1988), and argue that factual issues should have precluded summary judgment. In *Webster* the defendant landowner erected a four-strand barb wire fence across a desert wash that she knew was frequented by trespassers, including equestrians. The fence posts were obscured by brush, and the court characterized both the posts and the barb wire as "virtually invisible." The plaintiff rode his horse into the fence and suffered serious injuries. The Arizona Supreme Court simply determined that a reasonable jury could choose to accept plaintiff's contention that the landowner should have known that trespassers would not perceive the existing risk.

The present matter is entirely dissimilar. The condition upon which Tate injured himself was not virtually invisible, and the landowners had no reason to expect, even if they had known of the condition, that trespassers would not discover it and realize the risk involved. This case does not present a question of fact for the jury.

This case is very similar to *Watters v. Buckbee Mears Co.*, 354 N.W.2d 848 (Minn.App. 1984), an action brought by trespassers to recover for injuries sustained while "four-wheeling" on private land which had been used to mine gravel. Two passengers in the vehicle had previously been on the property for recreational riding. The trespassers drove up a hill and were injured when their vehicle went over a vertical drop. The court recognized

that exceptions to the general rule of no liability to trespassers require that the condition be concealed. The court enforced the general rule, stating the following: "An inspection, however brief, would have revealed the ledge on the other side. The danger was not concealed." *Id.* at 851. Likewise, in the present case, even a brief inspection by the trespasser Tate would have revealed the ledge upon which he was injured. The landowners are not responsible under Arizona law for Tate's injury.

Petitioners seem to argue that whether a condition is hidden or concealed is, in all cases, a question of fact that only a jury can decide. First, this argument ignores federal procedural rules. The party opposing a motion for summary judgment must "set forth specific facts showing that there is a genuine issue for trial." Rule 56, Federal Rules of Civil Procedure. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 252 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted). Petitioners fail to cite significantly probative evidence from which jurors could reasonably find that the fifteen-foot cliff – the same one which petitioners allege should have been obvious to the landowners – was a hidden or concealed condition. In fact, petitioners present absolutely no evidence from which one could conclude that even the briefest inspection by the trespasser would not have led to a discovery of the cliff.

Second, in arguing that a jury issue should have precluded summary judgment, petitioners rely on cases that deal with a landowner's defense that the condition was open and obvious; this is an issue of contributory negligence, which by the Arizona Constitution, Article 18, § 5, is to be decided by the jury. *Markowitz v. Arizona Parks Bd.*, 706 P.2d 364 (1985). This is not the same issue that exists in the present matter, which is whether the landowners violated their duty owed to trespassers by failing to warn of a condition that was hidden or concealed. A determination of the alleged tort feasor's negligence is permitted under Rule 56 and is not reserved exclusively for the jury.

Petitioners make the additional error of failing to recognize the distinction between "open and obvious" and "hidden and concealed." Petitioners argue that the cliff was not open and obvious; this does not necessarily make it hidden and concealed. Petitioners have failed to set forth specific facts to create a genuine issue for trial on any claim that the cliff was hidden and concealed. The Ninth Circuit correctly affirmed summary judgment in favor of the respondent landowners.

CONCLUSION

For all the reasons previously stated, this case presents no issue appropriate for the exercise of this Court's jurisdiction. Accordingly, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 25th day of March, 1993.

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